IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

POLYMER DYNAMICS, INC.	:	**CIVIL ACTION**
	:	
v.	:	
	:	
BAYER CORPORATION	:	**NO. 99-4040**

M E M O R A N D U M

WALDMAN, J. **August 14, 2000**

I. Introduction

Plaintiff Polymer Dynamics, Inc. ("PDI") asserts a civil RICO claim under 18 U.S.C. § 1962(c) and supplemental state law claims of fraud, negligent misrepresentation, breach of contract, breach of fiduciary duty, misappropriation of trade secrets and unfair competition. Presently before the court is defendant's Motion to Dismiss the RICO claim and four of the state law claims, as well as the prayer for lost profits and other consequential damages.

II. Legal Standard

The purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of a complaint. See Sturm v. Clark, 835 F.2d 1009, 1011 (3d Cir. 1987). In deciding such a motion, the court accepts as true the factual allegations in the complaint and reasonable inferences therefrom, and views them in a light most favorable to the nonmovant. See Rocks v. Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989). The court may also consider exhibits appended to the complaint, documents integral to the complaint or upon which it is based and matters of public record. See In re

Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1426 (3d Cir. 1997); Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1384 n.2 (3d Cir. 1994); Pension Benefit Guaranty Corp. v. White Consolidated Industries, Inc., 998 F.2d 1192, 1196 (3d Cir. 1993).[1] Dismissal of a claim is appropriate only when it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief on that claim. See Hishon v. King & Spaulding, 467 U.S. 69, 73 (1984); Robb v. Philadelphia, 733 F.2d 286, 290 (3d Cir. 1984).

III. Facts

As alleged by plaintiff the pertinent facts are as follow.

PDI is a Pennsylvania corporation headquartered in Allentown. PDI manufactures polyurethane-based insoles and outsoles which it sells to shoe manufacturers. PDI has developed molding technology for the small polyurethane parts market.

Bayer Corporation ("Bayer") is an Indiana corporation with its principal place of business in Pennsylvania. It operates through various divisions. Those involved in this case are Hennecke Machinery and Bayer Financial Services.[2] Bayer AG

---

[1]In assessing a motion to dismiss a RICO claim, courts may also consider the plaintiff's RICO case statement. See Lorenz v.CSX, 1 F.3d 1406, 1413 (3d Cir. 1993); Glessner v. Kenny, 952 F.2d 702 712 n.9 (3d Cir. 1991); Smith v. Berg, 1999 WL 1081065, *21 (E.D. Pa. Dec. 1, 1999).

[2]Defendant advises that Hennecke Machinery is actually a unit of defendant's Polyurethanes Division. Whether Hennecke is a division or unit of a division of defendant Bayer is immaterial to the analysis in this case.

is Bayer's German parent corporation. It is the leading manufacturer of polyurethane raw materials, formulations and machinery in the world.

PDI was in search of machines that could inject and mix polyol and isocyanate chemicals quickly. After several months of negotiations and discussions of written proposals, Bayer and PDI contracted in 1996 for the sale of two Polyurethane Machines. The contract contained a limitation of liability provision excluding recovery of lost profits and other consequential damages in contract or tort.

Hennecke Machinery manufactured the metering and mixing systems and machinery which Bayer sold to PDI. The systems and machinery were manufactured and sold under United States and foreign patents held by Bayer AG and its affiliate Maschinenfabrik Hennecke Gmbh ("Hennecke Gmbh"). These systems and machinery, and the accompanying services, were represented by Bayer to plaintiff to meet its specific requirements. Bayer delivered these machines in May 1996.

In August 1996, the parties entered into negotiations for the acquisition of three additional machines. In May 1997, PDI entered into a lease-purchase agreement with Bayer Financial Services to finance the acquisition of the three new Polyurethane Machines and Motoman Robots. The agreement called for a $300,000 down payment to be followed by 48 monthly payments of $19,625 and a $1 buyout. These machines were delivered to PDI in June 1997.

After plaintiff refused to make its lease payments in full because of the inadequate and defective nature of the equipment, Bayer Financial declared PDI's lease in default on October 30, 1998. Plaintiff claims that this declaration was false in that Bayer and Bayer Financial knew the systems and machinery were inadequate and defective. Ultimately, Bayer filed a replevin action in May 1999 to seize the machines. Plaintiff then paid Bayer an agreed upon amount for the machines which plaintiff had by then substantially modified at great expense. In total, PDI paid Bayer and Bayer Financial Services in excess of $4,000,000 for the five systems and machinery, parts, chemicals and finance charges on the equipment lease.

The five machines supplied by Bayer were defective and continually failed to perform their intended function. Plaintiff began complaining about various aspects of the equipment soon after the first two machines were delivered. Throughout the next few years, plaintiff continued to experience severe problems with the machines. Defendant and other members of the alleged enterprise made false assurances of quality and misrepresentations regarding the success of repairs. In response to plaintiff's complaints, Bayer scheduled visits for PDI to Hennecke Machinery in September 1997 ostensibly to obtain technical assistance but then denied plaintiff access to any machine shop. Bayer AG then arranged in 1998 for evaluations of PDI's equipment by its German technical staff, however, the

problems with the equipment continued after these evaluations.

Defendant misrepresented to plaintiff that the machines would meet PDI's requirements, that problems with the machines were being resolved, that the machines were built according to specifications and that any problems experienced by plaintiff were the result of its chemical formulations. Defendant failed to disclose that the machines would not perform properly, that the nozzles had a useful life of only a few days, that the system provided was incapable of meeting plaintiff's requirements, and that the pertinent patents were not followed in the manufacture of the machines. Defendant also "held out to plaintiff promises of a partnership and future business from Bayer."

In reliance, plaintiff invested millions of dollars in purchase and finance costs for defective machinery, and exchanged confidential commercial information with defendant which was used by it and its affiliates for their commercial advantage.[3] Bayer incorporated PDI technology into new machinery for sale to Bayer customers and used confidential information obtained from plaintiff to modify systems and machinery made by defendant for other customers. Defendant thus enhanced its position to compete with plaintiff and has solicited its customers.

Between 1995 and 1998, plaintiff received 49 mailings and 16 interstate telephone calls from Bayer, Hennecke Machinery

[3]It appears that some of this information was subject to a disclosure agreement which essentially limited its use for the benefit of PDI. The agreement pertains to certain information disclosed between December 1, 1995 and November 30, 1996.

and Bayer Financial related to the acquisition, financing or servicing of the machinery in question or seeking payment of amounts overdue under the lease.

IV. Discussion

A. Plaintiff's RICO Claim

To sustain a civil RICO claim under § 1962(c), a plaintiff must show the existence of an enterprise affecting interstate commerce; that the defendant was employed by or associated with the enterprise; that the defendant participated in the conduct of the affairs of the enterprise; and, that the defendant did so through a pattern of racketeering activity which included at least two predicate acts. See Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 496 (1985); Annulli v. Panikkar, 200 F.3d 189, 198 (3d Cir. 1999). To satisfy the participation requirement, a defendant must participate in the operation or management of the RICO enterprise. See Reves v. Ernst & Young, 507 U.S. 170, 185 (1993). A plaintiff has standing and can recover only to the extent that he has been injured in his business or property by the conduct constituting the violation. Sedima, 473 U.S. at 496.

Defendant challenges virtually every aspect of plaintiff's RICO claim. Defendant argues that plaintiff has failed to set forth a scheme to defraud to support the alleged predicate acts of mail and wire fraud, has failed to show a "pattern" of racketeering activity and has failed to plead a

distinct RICO enterprise the affairs of which defendant conducted through such a pattern.

Plaintiff essentially claims that defendant knowingly provided non-conforming and defective machinery to plaintiff and lulled it with false representations regarding repair to secure more business and ultimately to obtain millions of dollars, and induced plaintiff with false promises of a business relationship to share valuable confidential commercial information which defendant misappropriated. Plaintiff sets forth numerous mailings and interstate wire communications made by defendant in furtherance of this activity. Plaintiff has pled predicate acts of mail and wire fraud sufficient to survive a motion to dismiss. See Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1415 (3d Cir. 1991); Schuylkill Skyport Inn, Inc. v. Rich, 1996 WL 502280, *14 (E.D. Pa. Aug. 21, 1996).

To establish a pattern of racketeering activity, a plaintiff must show that the racketeering acts are related and amount to or pose a threat of continued unlawful activity. H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 239 (1989); Kehr Packages, 926 F.2d at 1412.

Racketeering acts are related if they have the same or similar purposes, results, participants, victims, or methods of commission, or are otherwise "interrelated by distinguishing characteristics and are not isolated events." H.J. Inc., 492 U.S. at 240; Tyler v. O'Neill, 994 F. Supp. 603, 615 (E.D. Pa. 1998), aff'd, 189 F.3d 465 (3d Cir. 1999), cert. denied, 120 S. Ct. 981 (2000).

Continuity refers to a closed period of repeated conduct or past conduct that by its nature projects into the future the threat of repetition. H.J. Inc., 492 U.S. at 241-42; Tyler, 994 F. Supp. at 615. Continuity over a closed period may be demonstrated by a series of related predicate acts extending over a substantial amount of time. H.J. Inc., 492 U.S. at 241-42; Tyler, 994 F. Supp. at 615.

The acts of mail and wire fraud alleged are related, extend over a three year period, have the common purpose of fraudulently obtaining money and valuable proprietary information from plaintiff, and have the same participants, victim and method of commission. See, e.g., United States v. Pelullo, 964 F.2d 193, 209 (3d Cir. 1992)(allegations of predicate acts over 19 month period sufficient to find continuity); Kehr Packages, 926 F.2d at 1414 (relatedness test will nearly always be satisfied in cases alleging at least two acts of mail fraud stemming from same fraudulent transaction); Leonard A. Feinberg, Inc. v. Central Asia Capital Corp., 974 F. Supp. 822, 849-50 (E.D. Pa. 1997) (predicate acts extending over one year period sufficient).

Plaintiff has alleged a pattern of racketeering activity sufficient to withstand a motion to dismiss.

Plaintiff alleges two enterprises. The first consists of defendant Bayer, Hennecke Machinery, Bayer Financial Services, Bayer AG and Hennecke Gmbh (“Bayer Enterprise”). The second consists of these entities plus PDI itself (“Bayer-PDI Enterprise”).

An enterprise includes "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). As § 1962(c) requires a finding that the defendant "person" conducted or participated in the conduct of the affairs of an "enterprise" through a pattern of racketeering activity, the "person" charged with a violation of § 1962(c) must be separate and distinct from the "enterprise." Kehr Packages, 926 F.2d at 1411; Tyler, 994 F. Supp. at 614.

Although the distinctiveness requirement precludes a claim against a corporation as both a "person" and the "enterprise," the defendant person may be a member of an association in fact enterprise. See Perlberger v. Perlberger, 1999 WL 79503, *2 (E.D. Pa. Feb. 12, 1999)(overlap between defendant persons, an individual and law firm of which he is sole shareholder, and members of association in fact enterprise does not defeat distinctiveness requirement); S&W Contracting Servs., Inc. v. Philadelphia Hous. Auth., 1998 WL 151015, *6 (E.D. Pa. March 25, 1998)(defendant can be both person and member of association in fact enterprise); Schuylkill Skyport Inn, Inc. v. Rich, 1996 WL 502280, *32 (E.D. Pa. Aug. 21, 1996)(attorneys may be persons and part of association in fact enterprise); PTI Servs., Inc. v. Quotron Sys., Inc., 1995 WL 241411, *12-13 (E.D. Pa. April 19, 1995)(entity may be member of association in fact enterprise while participating in conduct of affairs of the enterprise as a RICO person); Crown Cork & Seal Co. Inc. v.

Ascah, 1994 WL 57217, *2 (E.D. Pa. Feb. 18, 1994) (defendant persons as a group may constitute association in fact enterprise).

A plaintiff also can be an enterprise or a member of an enterprise. See United States Energy Owners Comm. v. United States Energy Management Sys., Inc., 837 F.2d 356, 362 (9th Cir. 1988); Com-Tech Assocs. v. Computer Assocs. Int'l, Inc., 753 F. Supp. 1078, 1088-89 (E.D.N.Y. 1990), aff'd, 938 F.2d 1574 (2d Cir. 1991); Prudential Ins. Co. of America v. U.S. Gypsum, 711 F. Supp. 1244, 1261 n.5 (D.N.J. 1989)(plaintiff may be member of enterprise); Temple University v. Salla Bros. Inc., 656 F. Supp. 97, 102 (E.D. Pa. 1986)(plaintiff may be "enterprise").

An enterprise consisting of a corporate defendant and its parent, subsidiaries, affiliates or agents, however, will rarely satisfy the distinctiveness requirement. See Bachman v. Bear, Stearns & Co., 178 F.3d 930, 932 (7th Cir. 1999); Discon, Inc. v. NYNEX Corp., 93 F.3d 1055, 1064 (2d Cir. 1996), vac'd on other grounds, 525 U.S. 128 (1998); Compagnie De Reassurance v. New England Reinsurance Corp., 57 F.3d 56, 92 (1st Cir. 1995); Gasoline Sales, Inc. v. Aero Oil Co., 39 F.3d 70, 73 (3d Cir. 1994). A narrow exception has been recognized where a corporate defendant in an association in fact enterprise of affiliated entities plays a role in the racketeering activity distinct from the undertakings of the affiliates. See Khurana v. Innovative Health Care Sys., Inc., 130 F.3d 143, 153 (5th Cir. 1997); Gasoline Sales, 39 F.3d at 73; Stewart v. Associates Consumer

Discount Co., 1 F. Supp. 2d 469, 475 (E.D. Pa. 1998).[4]

It is not enough that a parent and subsidiary have different roles in the enterprise, something typical of every such relationship. See Fogie v. Thorn Americas, Inc., 190 F.3d 889, 898 (8th Cir. 1999). It is not enough that a parent corporation obtained benefits from a defendant-subsidiary's unlawful activity. See Eli Lilly, 23 F. Supp. 2d at 488; Bodtker v. Forest City Trading Group, 1999 WL 778583, *10 (D. Ore. Oct. 1, 1999) ("that the parent corporation benefits economically from the fraudulent practices of its subsidiary is not enough"). It is not enough that affiliated companies act in concert to further a common scheme to defraud. See Gasoline Sales, 39 F.3d at 73; Eli Lilly, 23 F. Supp. 2d at 487.

It also is not alone enough to show an enterprise consisting of affiliated entities each of which played a role in the predicate activity. A defendant must conduct the affairs of

---

[4]Plaintiff suggests that after the decision in Jaguar Cars, Inc. v. Royal Oaks Motor Car Co., 46 F.3d 258 (3d Cir. 1995), affiliated corporations must be viewed generally as distinct for RICO enterprise purposes. Such a reading of Jaguar Cars has been rejected by a number of courts and adopted by none. See Brannon v. Boatmen's First Nat'l. Bank of Okla., 153 F.3d 1144, 1148 n.4 (10th Cir. 1998); Emery v. American General Finance, Inc., 134 F.3d 1321, 1324-25 (7th Cir. 1998); Dow Chem Co. v. Exxon Corp., 30 F. Supp. 2d 673, 700-01 (D. Del. 1998); Eli Lilly and Company v. Roussel Corp., 23 F. Supp. 2d 460, 488 n.43 (D.N.J. 1998); Metcalf v. PaineWebber Inc., 886 F. Supp. 503, 513-14 & n.12 (W.D. Pa. 1995), aff'd, 79 F.3d 1138 (3d Cir. 1996). Jaguar Cars stands for the statutorily consistent and unremarkable proposition that an insider who controls a corporate entity and conducts its affairs through a pattern of racketeering activity may be liable as a "person" under § 1962(c). The Court in Jaguar Cars did not state or imply that a combination of a corporation and its officers could as a general matter constitute a RICO enterprise.

the enterprise and not merely its own affairs. Thus, a plaintiff who pleads an enterprise consisting of a defendant-subsidiary and its parent must show how the defendant participated in the operation or management of the parent and, of course, how it did so through a pattern of racketeering activity. See Bodtker, 1999 WL 778583 at *11-12. The defendant company "must be shown to use its agents or affiliates in a way that bears at least a family resemblance to the paradigmatic RICO case in which a criminal obtains control of a legitimate (or legitimate-appearing) firm and uses the firm as an instrumentality of criminality." Emery, 134 F.3d at 1324.

Plaintiff's allegations regarding the roles of the purported members of the enterprise in the alleged racketeering activity and the element of defendant's control are cursory and largely conclusory.

What does appear or may reasonably be inferred is that defendant knowingly misrepresented the nature and quality of equipment offered for sale to plaintiff. Defendant and its parent induced plaintiff to make further purchases with false assurance of technical assistance and repair. Bayer Financial declared plaintiff in default and demanded payment under the lease-purchase agreement, knowing that plaintiff had been cheated and was not legally in default. Defendant's promises of a partnership and future business induced plaintiff to share valuable proprietary information which was then misused to injure plaintiff in its business. Mere broken promises, of course, do not constitute fraud. See Perlman v. Zell, 185 F.3d 850, 853

(7th Cir. 1999). While not expressly pled, however, it may reasonably be inferred from the totality of the allegations that defendant never intended to keep these promises. Defendant allegedly "orchestrated" the actions which comprise the scheme and thus, at least inferentially, may have had and exercised the power to participate in the operation of the parent and pertinent affiliates through a pattern of mail and wire fraud.

Given the exacting standard governing Rule 12(b)(6) motions, these allegations and inferences set forth an "enterprise" of affiliated entities whose affairs defendant "conducted" through a pattern of mail and wire fraud in which each played a distinct role adequately, if barely, to survive a motion to dismiss.

The Bayer-PDI enterprise is another matter. An "enterprise" must have an existence separate from the pattern of racketeering activity. See U.S. v. Turkette, 452 U.S. 576, 583 (1981); U.S. v. McDade, 28 F.3d 283, 295 n. 15 (3d Cir. 1994). As pled, it does not appear that defendant had any appreciable relationship with plaintiff apart from the alleged predicate activity. That one business entity deceived another in a commercial transaction does not make a combination of the two into an enterprise or virtually every perpetrator and victim of a fraud scheme would qualify as an "enterprise." See R.C.M. Executive Gallery Corp. v. Rols Capital Co., 1997 WL 27059, *8 n.8 (S.D.N.Y. Jan. 23, 1997) ("[t]he allegation that the plaintiffs were part of an associated-in-fact enterprise to defraud themselves is a transparent conclusory allegation that

the Court is not bound to accept even on a motion to dismiss").

In any event, the Bayer enterprise has been pled sufficiently to withstand a motion to dismiss and thus the RICO claim in count I stands.

B. Plaintiff's State Law Claims

Defendant argues that the fraud claim asserted in count II should be dismissed pursuant to the "gist of the action" doctrine as the count does nothing more than set forth a breach of contract claim. The "gist of the action" doctrine bars claims for allegedly tortious conduct where the gist of the conduct alleged sounds in contract rather than tort. See Quorum Health Resources, Inc. v. Carbon-Schuylkill Community Hosp., Inc., 49 F. Supp. 2d 430, 432 (E.D. Pa. 1999); Sunquest Info. Sys., Inc. v. Dean Witter Reynolds, Inc., 40 F. Supp. 2d 644, 651 (W.D. Pa. 1999); Factory Market, Inc. v. Schuller Int'l Inc., 987 F. Supp. 387, 392-94 (E.D. Pa. 1997); Redevelopment Auth. of Cambria v. International Ins. Co., 685 A.2d 581, 590 (Pa. Super. 1996); Phico Ins. Co. v. Presbyterian Med. Servs. Corp., 663 A.2d 753, 757 (Pa. Super. 1995). The doctrine precludes a tort claim which essentially duplicates a breach of contract claim or the success of which is wholly dependent on the terms of a contract. See Sunquest, 40 F. Supp. 2d at 651(citations omitted). An exception to the doctrine exists where the contract is collateral to primarily tortious conduct. See Quorum Health Resources, 49 F. Supp. 2d at 432; Sunquest, 40 F. Supp. 2d at 651.

The factual bases underlying plaintiff's fraud and contract claims clearly overlap. Plaintiff, however, alleges

that certain misrepresentations by defendant, including promises of future business not contemplated by the sales contracts, induced plaintiff to reveal confidential commercial information to defendant. Moreover, it is not clear that all of the proprietary information related was encompassed by the parties' disclosure agreement which on its face applied only to disclosures between December 1, 1995 and November 30, 1996. The court cannot conclude beyond doubt from the pleadings that the contract is not collateral to any of plaintiff's fraud allegations.

Defendant argues that the economic loss doctrine precludes plaintiff from recovering on the negligent misrepresentation claim asserted in count III for any losses it suffered as a result of defendant's alleged breach of contract. The economic loss doctrine precludes recovery of economic losses in tort by a plaintiff whose entitlement to such recovery "flows only from a contract." Duquesne Light Co., 66 F.3d at 618; Factory Market, 987 F. Supp. at 395.[5]

[5]Bayer does not argue that plaintiff's fraud claim is barred by this doctrine. Courts in this district have split as to whether the economic loss doctrine applies to such a claim. Compare Peerless Wall & Window Coverings, Inc. v. Synchronics, Inc., 85 F. Supp. 2d 519, 535 (W.D. Pa. 2000) (economic loss doctrine inapplicable to tort claim based on intentionally false representation); North Am. Roofing & Sheet Metal Co. v. Building & Constr. Trades Council, 2000 WL 230214, *7 (E.D. Pa. Feb. 29, 2000)(same); Sunquest, 40 F. Supp. 2d at 658; Auger v. Stouffer Corp., 1993 WL 364622, *5 (E.D. Pa. Aug. 31, 1993)(same); Palco Linings, Inc. v. Pavex, Inc., 755 F. Supp. 1269, 1274 (M.D. Pa. 1990), with Sneberger v. BTI Americas, Inc., 1998 WL 826992, *7-8 (E.D. Pa. Nov. 30, 1998) (applying economic loss doctrine to intentional misrepresentation claim); Sun Co. v. Badger Design & Constructors, Inc., 939 F. Supp. 365, 371 (E.D. Pa. 1996) (same).

The doctrine recognizes that tort law "is not intended to compensate parties for losses suffered as a result of a breach of duties assumed only by agreement." Factory Market, 987 F. Supp. at 395-96 (quoting Palco Linings, Inc. v. Pavex, Inc., 755 F. Supp. 1269, 1271 (M.D. Pa. 1990)). The doctrine precludes recovery of damages in tort which "were in the contemplation of the parties at the origination of the agreement." Factory Market, 987 F. Supp. at 396 (quoting Auger v. Stouffer Corp., 1993 WL 364622, *3 (E.D. Pa. Aug. 31, 1993)).

Plaintiff seeks damages which appear to arise from the alleged breach of contract including payments for purchases of the systems, machinery, parts and chemicals, lost profits, excess costs from factory defects and lost profits. Plaintiff, however, also alleges that it incurred expenses for equipment, labor, finance charges, professional fees and other things which it would not have had defendant not misrepresented the nature of and it ability to remediate the problems with the equipment. The court cannot conclude from the face of the pleadings that plaintiff will be unable to prove that any of the alleged damages resulted from the alleged misrepresentations and breach of a duty beyond that assumed by contract.

Defendant argues that the breach of fiduciary duty claim asserted in Count V is deficient because no fiduciary relationship existed between PDI and Bayer. A fiduciary duty arises from a special relationship of trust in which there is "confidence reposed by one side [and] domination and influence

exercised by the other." Antinoph v. Laverell Reynolds Sec., Inc., 703 F. Supp. 1185, 1188 (E.D. Pa. 1989) (citation omitted). See also Tyler, 994 F. Supp. at 611. A business association may form the basis of a confidential relationship only if one party surrenders substantial control over some portion of his affairs to the other. See Tyler, 994 F. Supp. at 612; McDermott v. Party City Corp., 11 F. Supp. 2d 612, 626 (E.D. Pa. 1998); In Re Estate of Scott, 316 A.2d 883, 886 (Pa. 1974).

Plaintiff has alleged that the relationship between the parties was one of trust and that defendant exercised influence over plaintiff through its misrepresentations. Plaintiff has not alleged facts to show that it surrendered substantial control over its affairs or that defendant exercised dominance over plaintiff. Merely that one party trusts another who deceived him does not constitute breach of a fiduciary duty or virtually every perpetrator of fraud and his victim could be said to have a fiduciary relationship.

Defendant also challenges the claim for unfair competition asserted in count VII. The elements of a cause of action for unfair competition under Pennsylvania common law are generally the same as those for a claim under 15 U.S.C. § 1125(a)(1) of the Lanham Act, with the exception that no affect on interstate commerce need be shown. The essence of such a claim is injury to a competitor by an attempt to pass off goods or services of one party as those of another. See Haymond v. Lundy, 2000 WL 804432, *12 (E.D. Pa. Jun 22, 2000); Gideons

Intern., Inc. v. Gideon 300 Ministries, Inc., 94 F. Supp. 2d 566, 580 (E.D. Pa. 1999); J & M Turner, Inc. v. Applied Bolting Tech. Products, Inc., 1998 WL 47379, *8 (E.D. Pa. Jan 30, 1998), aff'd, 173 F.3d 421 (3d Cir. 1998); International Hobby Corp. v. Rivarossi S.P.A., 1998 WL 376053, *7 n.7 (E.D. Pa. June 29, 1998), aff'd, 203 F.3d 817 (3d Cir. 1999); Allen-Myland v. International Bus. Mach. Corp., 746 F. Supp. 520, 553 (E.D. Pa. 1990), decision supplemented on other grounds, 770 F. Supp. 1014, 1030 (E.D. Pa. 1991); Moore Push-Pin Co. v. Moore Bus. Forms, Inc., 678 F. Supp. 113, 116 (E.D. Pa. 1987). To be actionable, of course, the alleged misleading conduct must be undertaken by a competitor or business rival of the plaintiff. See Serbin v. Ziebart Int'l. Corp., 11 F.3d 1163, 1175, 1179 (3d Cir. 1993); B.V.D. Co. v. Kaufmann & Baer Co., 166 A. 508, 508 (Pa. 1922).

Defendant contends that plaintiff has failed to show that the parties are business competitors and has failed to show deceit or consumer confusion.

Plaintiff has alleged that defendant solicited plaintiff's customers with the use of misappropriated confidential information and technology which defendant incorporated into its products. From such an allegation, one can reasonably infer that the parties competed for at least some of the same potential customers.

Plaintiff contends that a showing of deception or consumer confusion is unnecessary. Plaintiff relies on several cases for this proposition. Three of these cases, however, do

not involve claims for unfair competition but rather claims for misappropriation of trade secrets. See College Watercolor Group, Inc. v. Wm. H. Newbauer, Inc., 360 A.2d 200 (Pa. 1976); Den-Tal-Ez, Inc. v. Siemens Capital Corp., 566 A. 2d 1214 (Pa. Super. 1989); Air Products and Chems. Inc. v. Johnson, 442 A.2d 1114 (Pa. Super. 1982).

Plaintiff also paraphrases language in a state Supreme Court opinion to suggest that pirating the employees of a competitor to destroy its business constitutes unfair competition. This language, however, was part of a discussion about intentional interference with employment contracts and inducing breaches of covenants not to compete or divulge confidential information. See Morgan's Home Equipment corp. v. Martucci, 136 A.2d 838, 847 (Pa. 1957). In later discussing unfair competition, the Court expressly noted the general element that the challenged conduct be "reasonably likely to produce confusion in the public mind." Id. at 848. See also Vincent Horowitz Co., Inc. v. Cooper, 41 A.2d 870, 872 (Pa. 1945) (noting lack of proof that "defendant's action consists of any fraud or deception in its dealings with third parties or consumers" in affirming denial of injunctive relief for alleged unfair competition).

Plaintiff cites a Superior Court case for the proposition that unfair competition encompasses more than trademark infringement. That case, however, involved likely public confusion from defendant's use of plaintiff's unregistered

generic name. See Pennsylvania State University v. University Orthopedics, Ltd., 706 A.2d 863, 867 (Pa. Super. 1998).

Nevertheless, plaintiff's position is not without support. While acknowledging that "the theory is a somewhat hazy one," the Third Circuit has recognized the possibility of relief under the Pennsylvania law of unfair competition "where there has been no fraud on the public but a misappropriation for the commercial advantage of one person of a benefit or property right belonging to another." Ettore v. Philco Television Broadcasting Corp., 229 F.2d 481, 490 (3d Cir. 1956). Moreover, it is not clear beyond doubt from the face of its pleadings that plaintiff will be unable to show customer deception or confusion. Plaintiff essentially alleges that defendant was representing and marketing to customers as its own technology which was in fact exclusively plaintiff's.

Defendant also argues that plaintiff's prayer for lost profits and other consequential damages in connection with its contract and misrepresentation claims should be stricken because the parties' contract expressly excludes such damages. Plaintiff responds that this clause does not bar its consequential damage claims because it has alleged that defendant acted willfully and wantonly, and because the clause may be unconscionable and unenforceable.

The limitation of liability clause excludes damages, whether arising in contract, strict liability or tort, for lost profits, lost operating time, loss or reduction in use of any

facilities, increased expense of operation or maintenance cost, value of investment or any other consequential damages. Plaintiff's prayer for lost profits, excess costs from factory defects and an investment to establish an operation in Mexico which was dependent on the successful functioning of the equipment supplied by defendant appear to fall within the limitation of liability clause.

Under Pennsylvania law, a limitation of liability clause in a commercial contract is enforceable "as long as the limitation which is established is reasonable and not so drastic as to remove the incentive to perform with due care." Valhal Corp. v. Sullivan Assoc., Inc., 44 F.3d 195, 204 (3d Cir. 1995). This is particularly so when the contract is between informed business entities dealing at arms length and there has been no injury to person or property. Id., 44 F.3d at 203-04. The limitation does not apply, however, to claims of willful and wanton conduct. Id. See also Valley Forge convention & Visitors Bureau v. Visitor's Services, Inc., 28 F. Supp. 2d 947, 950 (1998). Plaintiff has sufficiently alleged intentional tortious or willful and wanton conduct in its claim for fraud.[6]

A contract provision is unconscionable if one of the parties lacked a meaningful choice as to whether to accept the provision and the challenged provision so unreasonably favored the other party to the contract as to be "oppressive." See Seus

[6]Also, it is unclear from the documents referenced in the complaint which have been submitted that the contract governing the second transaction included a limitation of damages provision comparable to that contained in the first contract.

v. John Nuveen & Co., 146 F.3d 175, 184 (3d Cir. 1998); Witmer v. Exxon Corp., 434 AA.2d 1222, 1228 (Pa. 1981); Koval v. Liberty Mutual Ins. Co., 531 A.2d 487, 491 (Pa. Super. 1987), appeal denied, 541 A.2d 746 (Pa. 1988). Plaintiff has not alleged that it was prohibited from negotiating the contract terms. See Zawierucha v. Philadelphia Contributorship Ins. Co., 740 A.2d 738, 740 (Pa. Super. 1999). See also AAMCO Transmissions, Inc. v. Harris, 1990 WL 83336, *4-5 (E.D. Pa. June 18, 1990). Indeed, it appears from the pleadings that various proposals were negotiated at the time of the initial transaction and that negotiations prior to the subsequent transaction consumed nine months. Moreover, the limitation of liability provision is of a type often found in commercial contracts and on its face is not oppressive.

Plaintiff also contends that the failure of a repair remedy may vitiate a limitation of liability provision. For this contention, plaintiff relies on Chatlos Sys., Inc. v. National Cash Register Corp., 635 F.2d 1081 (3d Cir. 1980). That case actually involved the application and prediction of New Jersey law. The Court in Chatlos in fact held that the failure of a repair remedy, certain express and implied warranties, did not render unconscionable or ineffective a contractual provision excluding consequential damages. See id. at 1087.

V. Conclusion

Defendant protests that plaintiff is contriving tort claims and attempting to use the club of the civil RICO statute

in circumstances suggesting at most breaches of contract. This may prove to be true but, with the exception of breach of fiduciary duty, plaintiff's allegations are facially sufficient to survive a motion to dismiss its claims.

Consistent with the foregoing, defendant's motion will be granted as to the fiduciary duty claim in count V and will otherwise be denied. An appropriate order will be entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

POLYMER DYNAMICS, INC.	:	**CIVIL ACTION**
	:	
v.	:	
	:	
BAYER CORPORATION	:	**NO. 99-4040**

O R D E R

AND NOW, this day of August, 2000, upon consideration of defendant's Motion to Dismiss (Doc. #5) and plaintiff's response thereto, consistent with the accompanying memorandum, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** as to plaintiff's breach of fiduciary duty claim in Count V and is otherwise **DENIED**.

BY THE COURT:

_____
JAY C. WALDMAN, J.